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No. 00-1360

IN THE

Supreme Court of the United States

NEW YORK STATE BOARD OF ELECTIONS,

Petitioner,

v.

ANITA LERMAN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

NANCY NORTHUP
Counsel of Record
GILLIAN METZGER
BRENNAN CENTER FOR JUSTICE
AT NEW YORK UNIVERSITY
SCHOOL OF LAW
Attorneys for Respondents
161 Avenue of the Americas
12th Floor
New York, New York 10013
(212) 998-6730

167112

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether the Second Circuit was correct in holding that New York's political subdivision residence requirement for candidate petition witnesses, which is imposed in addition to an in-state residence requirement and a party registration requirement, violates the First Amendment because it imposes a severe burden on political speech and is not narrowly tailored to serving compelling government interests?

PARTIES TO THIS PROCEEDING

The petitioner in this case is the New York State Board of Elections ("State Board"), which was a defendant below.

Respondents are Anita Lerman, who served as a petition witness for a New York City Council candidate in 1999, and Angelo D'Angelo, who signed the petition carried by Lerman. Respondents Lerman and D'Angelo were plaintiffs below, along with another petition signer, Pio D'Agostino. D'Agostino was not a party to the proceeding before the Second Circuit as he did not appeal from the district court's adverse decision, and thus is not a party to this proceeding under this Court's Rule 12.6.

Also named as defendants below, but not filing a petition for certiorari and thus denominated respondents under Rule 12.6, are George A. Pataki, Governor of the State of New York, and the Board of Elections of the City of New York ("City Board").

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Respondents Anita Lerman and Angelo D'Angelo respectfully submit this brief in opposition to the Petition for Certiorari filed by the New York State Board of Elections in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a challenge to § 6-132(2) of New York's Election Law based on the First and Fourteenth Amendments to the United States Constitution.

United States Constitution, Amendment I, provides in relevant part:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of greiveances.

United States Constitution, Amendment XIV, § 1, provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York Election Law § 6-132(2), provides in relevant part:

> There shall be appended at the bottom of each sheet a signed statement of a witness who is a duly qualified voter of the state and an enrolled voter of the same political party as the voters qualified to sign the petition, and who is also a resident of the political subdivision in which the office or position is to be voted for. However, in the case of a petition for election to the party position of member of the county committee, residence in the same county shall be sufficient. Such a statement shall be accepted for all purposes as the equivalent of an affidavit, and if it contains a material false statement, shall subject the person signing it to the same penalties as it he had been duly sworn.

STATEMENT OF THE CASE

This case involves a challenge to the constitutionality of New York's requirement, contained in N.Y. Elec. Law § 6-132(2) (McKinney 1998), that witnesses carrying nominating petitions for political candidates must reside within the political subdivision where the candidate is running for office.

A. Factual Background and District Court Proceedings

To gain access to the primary election ballot in New York, candidates must obtain a certain number of nominating petition signatures from registered voters who are party members residing in the political subdivision where the candidates are running for office. Section 6-132(2) imposes restrictions on who may serve as petition witnesses

and circulate petitions to gather these signatures. The section requires that petition witnesses not only must be registered voters and party members, but also, like petition signers, must reside in the political subdivision where the candidate is running for office.

Respondent Anita Lerman served as a petition witness for John Sollazo, who was seeking access to the September 14, 1999 primary of the Independence Party in order to become the Independence Party's candidate for the 50th New York City Council district, located in Staten Island. To gain access to the Independence Party ballot Sollazo needed to obtain 38 signatures, representing 5% of the registered Independence Party members in the 50th district.[1] In her role as petition witness, Lerman witnessed a total of 58 nominating signatures for Sollazo, including a signature from respondent Angelo D'Angelo. However, all of the signatures Lerman gathered on Sollazo's behalf were subsequently invalidated because, although Lerman is a registered voter and Independence Party member, she resides in the neighboring 49th City Council district — also located in Staten Island — instead of the 50th district where Sollazo was running. As a result, Sollazo failed to obtain the 38 valid signatures he needed to appear on the Independence Party's primary ballot.

Respondents then filed a *pro se* complaint[2] against petitioner, the City Board and Governor Pataki. Respondents

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1. For City Council races, candidates are required to obtain signatures from 5% of resident party members, or 900 signatures, whichever is less. *See* N.Y. Elec. Law § 6-136(2).

2. Counsel for respondents first appeared when this case was on appeal after briefing was completed, and participated in oral argument and subsequent supplemental briefing ordered by the Second Circuit.

sought to have the petition witness residence requirement of § 6-132(2) declared unconstitutional and enjoined as violating the First and Fourteenth Amendments. The City Board filed a motion to dismiss which the U.S. District Court for the Eastern District of New York (Block, J.) granted, in a decision issued from the bench during a hearing on respondents' Order to Show Cause.

While this case was pending on appeal, the constitutionality of § 6-132(2)'s petition residence requirement was addressed again in a separate lawsuit which garnered far greater public attention and concerned the application of New York's ballot access rules in the context of the Republican Presidential Primary. *See Molinari v. Powers*, 82 F. Supp. 2d 57 (E.D.N.Y. 2000) (Korman, C.J.). Notwithstanding their continued assertion of § 6-132(2)'s constitutionality on appeal in this case, the State and City Boards stipulated in *Molinari* that the requirements for access to the Republican Presidential Primary ballot imposed an undue burden on political speech, and the district court accepted this stipulation only after concluding that the Republican primary ballot access "scheme, both in its totality and by virtue of two of its individual but related elements" — one of which was the petition witness residence requirement of § 6-132(2) — was unconstitutionally burdensome. *Id.* at 69. Pursuant to the stipulation, neither the State nor City Board appealed from the district court's determination in *Molinari* that § 6-132(2)'s witness residence requirement was unconstitutional.

B. Decision of the Second Circuit

On appeal in this case, a unanimous panel of the Second Circuit sided with the district court in *Molinari* and ruled § 6-132(2)'s requirement that candidate petition witnesses must

reside in the political subdivision where the candidate is running was facially unconstitutional.[3]

The Court of Appeals held that the petition witness residence requirement should be subject to strict scrutiny. It found strict scrutiny applicable first because the petition witness residence requirement, like the registered voter requirement at issue in *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999) ("*ACLF*") and the prohibition on anonymous leaflets at issue in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), "directly restricts 'core political speech' as opposed to the 'mechanics of the electoral process.' " Pet. App. at 18a (quoting *ACLF*, 525 U.S. at 207-08 (Thomas, J., concurring)) (additional internal quotations omitted). The court additionally held that strict scrutiny would be appropriate even if § 6-132(2)'s petition witness residence requirement was viewed more as an election process regulation, because the "requirement severely burdens political speech by 'dramatically reduc[ing] the number of persons . . . available to circulate petitions' " and inhibits political association. *Id.* at 19a-21a (quoting *ACLF*, 525 U.S. at 193). Specifically, it emphasized that the requirement served to render all but 760 of the 170,000 registered Independence Party members in New York State, or 99.5%, ineligible to witness candidate petitions in the 50th City Council district. *See id.* at 21a. It also noted

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3. After seeking briefing on the question of whether the defendants in this action were collaterally estopped from asserting § 6-132(2)'s constitutionality by virtue of their stipulation and failure to appeal in *Molinari*, the Second Circuit declined to decide this issue, stating "the preclusion issue is close . . . and . . . the merits of this case are not." Pet. App. at 7a-8a. The appeals court also rejected the City Board's claim that this action was moot and that respondents lacked standing. *See id.* at 8a-16a.

that signature gathering is particularly burdensome for minor party candidates or candidates who are not favored by the party leadership and therefore do not have easy access to the resources needed to ensure a place on the ballot. *See id.* at 22a.

The Second Circuit then reviewed the three government interests asserted as justifications for § 6-132(2)'s petition witness residence requirement — "(1) ensuring integrity and preventing fraud in the electoral process; (2) ensuring that candidates demonstrate a sufficient modicum of support before their name is included on the ballot; and (3) ensuring that non-residents may not impose the cost of a primary on the district" — and concluded that the "requirement does not bear even a *rational* relationship to any of these three justifications, let alone the narrowly tailored relationship that strict scrutiny demands." *Id.* at 26a (internal quotations omitted). While noting that New York unquestionably had a compelling interest in ensuring electoral integrity and preventing fraud, the court found that the petition witness residence requirement "does nothing to advance this end" because under unchallenged portions of § 6-132(2) petition witnesses must be registered voters in the state and provide their residence address in an affidavit. These measures, combined with the statewide subpoena power of local election boards, sufficed to ensure that petition witnesses are subject to the state's jurisdiction. *Id.* at 26a-28a.

Similarly, the appeals court found that the state's interests in ensuring local support for candidates was "already advanced by the requirement that candidates obtain a number of signatures from district residents," as was the interest in avoiding outsider-imposed primaries. *Id.* at 31a-32a. It also underscored that insofar as the defendants were attempting to justify the witness residence requirement on the grounds that it "helps to prevent

non-residents from influencing politics within the district," such an interest was not legitimate and could not be reconciled with the First Amendment's commitment to "ensuring the widest possible dissemination of information." *Id.* at 32a-33a (internal quotations omitted).

REASONS FOR DENYING THE WRIT

The question presented by petitioner is not appropriate for certiorari review. There is no conflict in the lower courts on the question of whether requiring candidate petition witnesses to reside in the political subdivision where the candidate is running for office violates the First Amendment. On the contrary, the well-reasoned opinion of the Second Circuit is completely consistent with other lower court decisions on point, including a Seventh Circuit decision on which this Court recently denied certiorari. *See Krislov v. Rednour*, 226 F.3d 851 (7th Cir. 2000), *cert. denied*, 121 S. Ct. 1085 (2001). The question urged by petitioner is also inappropriate for certiorari review because the Second Circuit's decision below is correct and carefully applies the governing analysis laid out by this Court in *ACLF* and in other opinions. Moreover, even if the question presented were to merit this Court's review, this case is not an appropriate vehicle for doing so given that petitioner has waived any argument that the witness residence requirement satisfies strict scrutiny and the presence of a substantial question as to whether petitioner is precluded from asserting the requirement's constitutionality.

I.

THE QUESTION PRESENTED IS NOT APPROPRIATE FOR CERTIORARI REVIEW.

A. There Is No Conflict in the Lower Courts on the Question Presented for this Court's Review.

Two years ago, in *ACLF*, this Court struck Colorado's requirement that ballot petition circulators must be registered voters as unconstitutional because it imposed a severe burden on political speech that was not warranted by the government interests asserted by the State. *See* 525 U.S. at 192-97. In reaching this conclusion, the Court applied a two step analysis under which it first determined that the requirement imposed a severe burden on political speech because, like the ban on paid circulators invalidated in *Meyer v. Grant*, 486 U.S. 414 (1988), it dramatically reduced the pool of individuals available to circulate petitions. *See ACLF*, 525 U.S. at 193-96; *Meyer*, 486 U.S. at 422-23. The Court then ruled that the interest Colorado asserted in defense of the voter registration requirement, "policing lawbreakers among petition circulators," was already met by Colorado's separate demand that circulators be state residents and provide affidavits attesting to their residence address. *ACLF*, 525 U.S. at 196. As a result, the Court concluded that the voter registration requirement failed its "now-settled approach" under which "state regulations imposing severe burdens on speech must be narrowly tailored to serve a compelling state interest." *Id.* at 192 n.12, 196-97 (internal quotations omitted).

There is no conflict in the lower courts regarding the application of the Supreme Court's decision in *ACLF* to

candidate petition witness requirements. On the contrary, the Second Circuit's decision below is completely consistent with other recent lower court decisions addressing the constitutionality of political subdivision residence requirements for candidate petition witnesses. In *Krislov*, a unanimous panel of the Seventh Circuit held that such a requirement contained in Illinois law violated the First Amendment.[4] *See* 226 F.3d at 866. Like the Second Circuit below, the Seventh Circuit concluded that Illinois' political subdivision residence requirement for petition circulators imposed a severe burden on political speech because it "prevent[s] the candidates from employing millions of potential advocates to carry their political message to the people of Illinois" and inhibits effective political association. *Id.* at 860-61. It then ruled that the state interests offered by Illinois to justify the rule failed to satisfy strict scrutiny, holding in particular that the residence requirement did not advance the state's interest in ensuring local support for candidates or preserving election integrity because these interests were already adequately served by other, more closely tailored provisions. *See id.* at 863-65. This Court denied a petition for certiorari in *Krislov* on February 20, 2001. *See McGuffage v. Krislov*, 121 S. Ct. 1085 (2001).

While *Krislov* is the only recent federal circuit court decision directly on point, several federal district courts and intermediate state appellate courts similarly have struck down local residence requirements for petition witnesses. *See, e.g., Molinari*, 82 F. Supp. 2d at 73-77 (holding that § 6-132(2)'s political subdivision petition witness residence requirement violates the First Amendment

4. The court in *Krislov* also struck down Illinois' requirement that petition circulators be registered voters. *See* 226 F.3d at 866.

and stating that *ACLF* removes any doubt about § 6-132(2)'s constitutionality); *Lawrence v. Jones*, 18 P.3d 1245, 1252-53 (Ariz. Ct. App. 2001) (reading city code provision as allowing circulation of referenda by nonresidents of city on grounds that a city residence requirement would be unconstitutional under *ACLF*); *KZPZ Broad., Inc. v. Black Canyon Concerned Citizens*, 13 P.3d 772, 778-80 (Ariz. Ct. App. 2000) (reading Arizona law as allowing circulation of county referenda by nonresidents of county on grounds that a county residence requirement would be unconstitutional under *ACLF*); *cf. Young v. Illinois State Bd. of Elections*, 116 F. Supp. 2d 977, 985 (N.D. Ill. 2000) (holding unconstitutional under *ACLF* an Illinois requirement, separate from that at issue in *Krislov*, which required that petition circulators be registered voters in the political subdivision where the petition is being circulated, but focusing on the registered voter requirement); *Tobin for Governor v. Illinois State Bd. of Elections*, 105 F. Supp. 2d 882, 887-88 (N.D. Ill. 2000) (same).

Other than the district court's bench opinion in this case, reversed by the Second Circuit, the only decision upholding a local residence requirement for petition witnesses is an earlier, pre-*ACLF* decision from a California state court, *Browne v. Russell*, 27 Cal. App. 4th 1116, 1124-26 (Cal. Ct. App. 1994). *Browne* offers little support to petitioner, however, as it rests on the California court's case-specific determination that the plaintiffs failed to introduce sufficient evidence demonstrating that the residency requirement burdened their right of political expression. Moreover, *Browne*'s continuing authority after *ACLF* is questionable insofar as the decision holds that a reduction in the pool of available circulators is irrelevant in assessing burden. *See id.* at 1125; *see also KZPZ*, 13 P.3d at 779 (*Browne* "may

be questionable law after [*ACLF*]"); 82 Ops. Cal. Atty. Gen. 250 (1999), 1999 WL 1249548 at *2-*3 (Cal. A.G.) (initiative petition circulators need not declare that they are registered voters of city and therefore under statute need not be city residents).

To the extent that recent decisions have upheld residence requirements for petition witnesses, they have addressed in-state residence requirements, not political subdivision residence requirements. *See Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 616-17 (8th Cir. 2001) (upholding requirement that initiative petition circulators be state residents as not unduly burdensome and narrowly tailored to serve state's compelling interest in preventing fraud because residency ensures circulators are subject to state's subpoena power); *Kean v. Clark*, 56 F. Supp. 2d 719, 733 (S.D. Miss. 1999) (same); *Hart v. Secretary of State*, 715 A.2d 165, 168 (Me. 1998) (same), *cert denied*, 525 U.S. 1139 (1999). As the Second Circuit emphasized, § 6-132(2) separately requires petition witnesses to be state residents, and plaintiffs did not challenge this aspect of § 6-132(2) here.[5] *See* Pet. App. at 28a & n.14. Thus, there is no conflict between the Second Circuit's decision below and these lower court decisions sustaining such in-state residence requirements. Moreover, these decisions offer no support to petitioner on the question presented for this Court's review, as contrary to petitioner they hold that in-state residence requirements should be subject to strict scrutiny. *See, e.g., Jaeger*, 241 F.3d at 616; *Kean*, 56 F. Supp. 2d at 730; *Hart*, 715 A.2d at 167-68; *see also Campbell v. Buckley*, 203 F.3d 738, 745 (10th Cir. 2000) (noting, in

5. New York's in-state residence requirement is embodied in § 6-132's requirement that petition witnesses be "duly qualified voter[s] of the state."

sustaining Colorado's title setting requirements for ballot initiatives, that "strict scrutiny is applied where the government restricts. . . . the available pool of circulators or other supporters of a candidate or initiative" and more generally "where the government restricts the overall quantum of speech available to the election or voting process").

B. The Question Urged by Petitioners Was Correctly Decided Below.

The Second Circuit's analysis carefully hews to the approach and analysis laid out in *ACLF* in ruling that New York's political subdivision residence requirement for petition witnesses violated the First Amendment. *ACLF* and *Meyer* make clear that speech by petition witnesses is interactive political speech and discussion at the core of the First Amendment's protections. *See ACLF*, 525 U.S. at 199; *Meyer*, 486 U.S. at 421-22. While these cases addressed ballot petitioning rather than candidate petitioning, there is no basis to conclude that candidate petitioning is any less political speech — and indeed, petitioner does not make such a claim here. *See* Pet. App. at 23a-25a; *Krislov*, 226 F.3d at 861-62; *see also ACLF*, 525 U.S. at 232 (Rehnquist, C.J., dissenting) (arguing that the majority opinion in *ACLF* put registered voter requirements for candidate petition circulators in jeopardy).

As in *ACLF*, the Second Circuit examined the impact § 6-132(2)'s political subdivision residence requirement had on the pool of available witnesses. The appeals court's determination that the residence requirement drastically reduces the pool of available witnesses is plainly correct under *ACLF*. There, the disqualification of 21% of the

available petition circulator pool (400,000 of 1.9 million potential circulators) was found to impose a severe burden, whereas here the pool reduction is 99.5%. *See id.* at 193; Pet. App. at 21a. Reductions of similar magnitude are present in regard to any congressional, state legislative, or local race in the state, as there are inevitably far fewer registered party members residing in any political subdivision than reside in the state as a whole. *See, e.g., Molinari*, 82 F. Supp. 2d at 75 (noting that the witness residence requirement "reduces by approximately 2.9 million to 3 million voters the pool of Republicans available to volunteer to petition in any particular district.")

Contrary to the claim of petitioner, *see* Pet. at 7, the substantial reduction in pool of available petition witnesses wrought by the residence requirement is not altered by the fact that notaries and commissioners of deeds are allowed to serve as petition witnesses. Petitioner failed to introduce any evidence into the record regarding the number of notaries and commissioners of deeds in New York. In *Molinari*, however, the district court found that there were only 250,000 notaries public in the state as a whole, 82 F. Supp. 2d. at 76 n.11 — clearly an inadequate number to compensate for the millions of registered party members who may be precluded from carrying petitions by the witness residence requirement, even assuming every notary was willing to serve as a witness. Moreover, this option is far more burdensome than using party volunteers, as notaries and commissioners are required to have each signer swear that the information the signer provided on the petition is true, *see* N.Y. Elec. Law § 6-132(3), and candidates often must pay notaries for their services, *see Molinari*, 82 F. Supp. 2d. at 76-77. Again, the Second Circuit correctly adhered to binding precedent in not holding that the notary and

commissioner of deed exception rendered § 6-132(2)'s residence requirement constitutional, for as this Court stated in *Meyer*, that a law "leaves open more burdensome avenues of communication[] does not relieve its burden on First Amendment freedoms." 486 U.S. at 423 (internal quotations omitted).

The Second Circuit's conclusion that the interests asserted by the state fail to justify the witness residence requirement also follows directly from *ACLF*. Under *ACLF*, it is clear that New York's in-state residency requirement, combined with the further requirement that witnesses provide an affidavit as to their address, suffices to ensure that petition witnesses are subject to the state's oversight and enforcement jurisdiction. *See* 525 U.S. 196-97. Particularly given that local election boards enjoy statewide subpoena power, *see* Pet. App. at 28a, there is simply no basis for petitioner's suggestion that the political subdivision residence requirement at issue here is needed "to subject petition witnesses to the jurisdiction of the state's courts." Pet. at 7. *ACLF* further establishes that at a minimum a challenged provision must be narrowly tailored to serving an asserted state interest to justify imposing a severe burden on political speech. The Second Circuit's determination that the interests offered by petitioner failed this test is unassailable, given that such local involvement is already assured by making only district residents eligible to sign petitions and the state is willing to allow non-local participation in the case of notaries and commissioners of deeds.

It is also worth noting that the interests petitioner asserts in defense of § 6-132(2)'s political subdivision residence requirement are not found in the legislative history of the provision. The measure was adopted at the same time as the requirement that witnesses be party members, and the main

purpose offered in justification was preventing party raiding. *See* Bill Jacket at 12-13, Ch. 351 § 1 of N.Y. Laws of 1951 (Letter from Assemblyman Anthony J. Travia); *see also id.* at 16 (memorandum from Louis J. Lefkovitz, Counsel to the Joint Legislative Committee to Revise and Recodify the Election Law of New York) (restrictions on petition witnesses are reasonable because primary election serve to settle a dispute within the party). In fact, the legislative history suggests that the real purpose of the measure was hardly so benign: Assemblyman Travia, the bill's sponsor, expressly justified it as a means of curbing the influence of the American Labor Party in New York City and other comments indicate that another motive was to enhance the power of party machines. *See id.*; *see also id.* at 3-4 (letter from Citizens Union arguing that the bill will limit political competition and harm insurgents); *id.* at 7-8 (measure will favor political machines in local districts). But even taking the stated party raiding concern at face value, it is adequately addressed by the requirements — again, not challenged here — that petition witnesses and signers must be enrolled party members.

II.

EVEN IF THE QUESTION PRESENTED WERE TO MERIT THIS COURT'S REVIEW, THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR DOING SO.

A. Petitioner Has Waived Any Argument That the Political Subdivision Residence Requirement of § 6-132(2) Satisfies Strict Scrutiny.

In addition, there are two significant obstacles to using this case as the vehicle for this Court to consider the constitutionality of political subdivision residence

requirement, even if it were to determine that this question merits review. The first is that petitioner has waived any argument that the political subdivision residence requirement of § 6-132(2) satisfies strict scrutiny. Before the court of appeals, neither petitioner nor the other defendants attempted to justify the political subdivision residence requirement as narrowly tailored to realizing compelling government interests. *See* Br. of Gov. Pataki at 10; Br. of State Board at 4; *see also* Pls.' Supp. Reply Br. at 1-2 (noting that defendants "rest their defense on the claim that the [residence] requirement imposes a minor burden on [p]laintiffs' rights and is subject only to rationality review."). Similarly, petitioner here makes no claim that § 6-132(2)'s political subdivision residence requirement would survive strict scrutiny, but instead only contends that the Second Circuit erred in applying such exacting review because the residence requirement is not burdensome. *See* Pet. at 5.

As a result, this Court would be limited to reviewing whether the political subdivision requirement should be subject to strict scrutiny because it directly targets core political speech or because of its impact on the pool of potential petition witnesses — questions that this Court has already addressed and answered in *ACLF* and *Meyer*. It would be precluded from reaching the very issues on which this case differs from those earlier decisions: specifically, whether such local residence requirements can be justified by concerns with preventing election fraud and ensuring local involvement in elections.

B. A Substantial Question Exists As to Whether Petitioner Is Precluded from Defending the Constitutionality of § 6-132(2) Here.

The second problem with using this case as a vehicle for considering the constitutionality of political subdivision residence requirements is that a strong argument can be made that petitioner is precluded from asserting the constitutionality of § 6-132(2)'s residence requirement by its stipulation in *Molinari*. As the Second Circuit detailed, petitioner and the City Board stipulated that "several provisions of the New York Election Law impose[d] an undue burden on access to the ballot in connection with the 2000 New York State Republican Presidential Primary. . . . [and] also agreed to waive their rights to appeal from any order entered by the district court based on that stipulation." Pet. App. at 5a (internal quotations omitted). In his decision, Chief Judge Korman carefully examined the political subdivision residence requirement and held, like the Second Circuit below, that the requirement was unconstitutional because it imposed a severe burden on political speech and was unjustified "under any test." 82 F. Supp. 2d at 77.

After being informed of the *Molinari* stipulation by respondents' counsel at oral argument in this case,[6] the Second Circuit specifically sought additional briefing on the question of whether petitioner and the other defendants were precluded from continuing to defend the constitutionality of § 6-132(2)'s political subdivision residence requirement. Although the Second Circuit ultimately did not reach a decision on this issue, noting that the preclusion question was close while the merits of the case were not, it stated that

6. Respondents' counsel also represented the plaintiffs in *Molinari*.

it was "not untroubled by the possibility that the defendants have attempted to evade their stipulation in *Molinari*." Pet. App. at 7a.

Petitioner's actions in stipulating to the residence requirement's unconstitutionality in *Molinari* while continuing to press its constitutionality here provide strong equitable grounds against granting certiorari. This course of behavior looks disquietingly like an attempt to game the system: petitioner avoided defending the requirement on appeal in the context of a politically sensitive, high publicity case, yet sought to avoid being legally bound by that failure to defend through asserting the constitutionality of § 6-132(2) in this *pro se*, low profile, appeal.

In addition, the presence of this preclusion issue means that a reversal by this Court on the merits might not alter the result in this case. It would be inappropriate for the Court to resolve the preclusion issue in the first instance, particularly as petitioner has not raised this issue in the petition for certiorari. As a result, the Second Circuit would need to address preclusion on remand before it could rule in petitioner's favor. Moreover, the court of appeals' evident discomfort with defendants' behavior suggests that if forced to reach the issue, it might well rule that defendants were indeed precluded by the *Molinari* stipulation from asserting the residence requirement's constitutionality here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

NANCY NORTHUP
Counsel of Record
GILLIAN METZGER
BRENNAN CENTER FOR JUSTICE
AT NEW YORK UNIVERSITY
SCHOOL OF LAW
Attorneys for Respondents
161 Avenue of the Americas
12th Floor
New York, New York 10013
(212) 998-6730